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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

IN RE: TD Ameritrade Account Holder
Litigation,

This Document Relates to All Actions

Master File No. C-07-2852 SBA

CLASS ACTION

**PLAINTIFFS' RESPONSE TO
OBJECTIONS TO FINAL APPROVAL OF
CLASS SETTLEMENT**

Date: April 19, 2011

Time: 1:00 p.m.

Place: Courtroom of the Honorable Sandra
Brown Armstrong

MASTER FILE NO. C-07-2852 SBA

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1 Plaintiffs Richard Holober and Brad Zigler respectfully submit this memorandum in
 2 response to objections that have been received and/or filed to the motion for final approval of a
 3 class action settlement achieved in this litigation.

4 **I. SUMMARY OF THE SETTLEMENT AND OBJECTIONS**

5 The terms of this class action settlement have been described in detail in plaintiffs' motion
 6 for final approval of the settlement. Under the settlement, TD Ameritrade will pay claims up to a
 7 total of \$6.5 million to members of the class who have suffered an identity theft. The settlement
 8 further provides that in no event will TD Ameritrade pay less than \$2.5 million in settlement. In
 9 the event that the total amount of the claims are less than \$2.5 million, any difference in the total
 10 claim amount (coupled with any amount awarded as fees and costs to counsel for plaintiffs) and
 11 \$2.5 million will be paid in equal portions to 5 non-profit organizations that work in the area of
 12 electronic privacy. In addition to the cash benefits for class members who suffered identity theft,
 13 the settlement provides that TD Ameritrade will retain an independent evaluator to assess whether
 14 the Company has met certain information technology security standards set forth in the
 15 Settlement Agreement, and TD Ameritrade will promptly act to correct any areas of non-
 16 compliance that are identified during the evaluation. In return for these benefit, class members
 17 will release their claims against TD Ameritrade.

18 Notice of the settlement was provided in accordance with the Court's Order, dated
 19 December 20, 2010. The Notice informed Settlement Class Members that objections were to be
 20 *filed* with the Court by March 15, 2011, with copies sent to counsel for Plaintiffs and the
 21 Defendant.¹ In addition, pursuant to the Class Action Fairness Act, ("CAFA"), 28 U.S.C. § 1711
 22 *et seq.*, notice disclosing the terms of the settlement was provided to the Attorney General's
 23 Offices of the fifty states, the District of Columbia and Puerto Rico. There have been no
 24 objections raised to the settlement by any Attorney General.

25
 26
 27 ¹ The Court's December 20, 2010 Order provided that objections were to be postmarked by
 28 March 15, 2011. Accordingly, we address in this memorandum all objections postmarked by
 March 15, 2011.

1 A number of documents have been filed requesting exclusion, filing claims, or otherwise
 2 informing the Court of misdirected mail or merely requesting notice in the case. The documents
 3 that have been filed with the Court which are nothing more than requests for exclusion are Docket
 4 Nos. 248, 249, 250, 251, 255, 257, 258, 260, 261, 263, 264, 268, 273, 274, 276, 277, 279, 280,
 5 281, 282 and 283. The claim forms that have been filed are Docket Nos. 256 and 262.² In
 6 addition, one document (Docket No. 278) is a letter from a class member who after filing a
 7 request for exclusion was apparently sent a letter from the U.S. Copyright Office in error.
 8 Another document is merely a notice that the postcard notice was sent in error to the wrong
 9 address (Docket No. 266). And, one document is merely a request for notices in connection with
 10 the case (Docket No. 259.) Since none of the foregoing voice any objection to the settlement, no
 11 response is necessary.

12 There are three documents (Docket Nos. 252, 253 and 254), that have been filed voicing
 13 objections and at the same time requesting exclusion. Pursuant to the Settlement Agreement and
 14 the Notice, any class member who objects and also seeks exclusion will be treated as an
 15 objector.³ The foregoing objections and the objections stated in Docket Nos. 244, 265, 267, 269,
 16 270, 271, 273, 275 and 288 will be addressed below along with additional objections which have
 17 to date not been reported on the docket but which have been submitted by the following class
 18 members: M. Blum; Bonnie Elaine Diskand and Conrad Lohutko.

19 The objections fall into a limited number of categories. In general these categories
 20 include objections that the settlement fails to provide relief for receipt of spam or fails to provide
 21 payment for future unknown identity theft and otherwise is insufficient to curb the actions that are
 22 alleged in the complaint; the claims process is too onerous because it requires that class members
 23 present some form of proof of identity theft; the settlement fails to provide sufficient relief for
 24 identity theft incurred by certain class members or fails to provide relief for class members who

25 ² Copies of these claim forms have been forwarded to the Claims Administrator.

26 ³ A few of the individuals who objected and requested exclusion have been identified on the list
 27 appended to the Declaration of Jeannine Andreis Re Request for Exclusions Received, filed
 28 March 24, 2011. A revised list identifying those who have timely and validly requested exclusion
 will be filed with the Court prior to the hearing on final approval.

1 may have purchased penny stock touted in spam email; or the settlement is unfair because class
2 counsel will purportedly receive excessive fees and costs and the lawsuit is otherwise frivolous.

3 As we show below, the objections that have been raised to the settlement fail to establish
4 any reason to deny final approval to a settlement that was achieved under the guidance of an
5 experienced jurist.

6 **II. ARGUMENT**

7 There is a strong policy favoring compromises that resolve litigation, in particular
8 complex litigation such as the class action that is before this Court. *MWS Wire Indus., Inc. v.*
9 *California Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986) (“There is an overriding public
10 interest in settling and quieting litigation” quoting *United States v. McInnes*, 556 F.2d 436, 441
11 (9th Cir. 1977); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d
12 Cir. 1995) (settlements are favored “particularly in class actions and other complex cases where
13 substantial judicial resources can be conserved by avoiding formal litigation”).

14 Federal Rule of Civil Procedure 23(e)(2) requires that the court determine whether a
15 proposed settlement is “fair, reasonable and adequate.” “The court’s inquiry into a consensual
16 agreement negotiated by the parties should seek only to ensure that the settlement is fair,
17 reasonable and adequate and not the result of fraud, over-reaching or collusion.” *Faigman v.*
18 *AT&T Mobility LLC*, Slip Opinion 2011 WL 672648 *2 (N.D. Cal. Feb. 16, 2011), citing *Officers*
19 *for Justice v. Civil Serv. Comm’n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

20 We have addressed the factors that the Court should consider in determining whether to
21 grant final approval of this settlement. Since the motion for final approval was presented prior to
22 the deadline for the filing of objections, in this brief we address the few objections that have been
23 voiced to the settlement.

24 **A. The Reaction of Class Members to the Settlement Provides Strong Evidence** 25 **That the Settlement is Fair, Reasonable and Adequate.**

26 In deciding whether a class settlement is fair, reasonable and adequate to the class, the
27 courts give strong consideration to the reaction of the class to the proposed settlement. *Molski v.*
28 *Gleich*, 318 F.3d 937, 953 (9th Cir. 2003). “It is established that the absence of a large number of

1 objections to a proposed class action settlement raises a strong presumption that the terms of a
 2 proposed class action settlement are favorable to the class members.” *Nat’l Rural*
 3 *Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. 2004).

4 Here, the court-approved procedures resulted in the notice being transmitted, either
 5 electronically and/or by mail to more than 6,000,000 class members. A total of 339 have
 6 requested exclusion from the class. (Declaration of Jeannine Andreis Re: Request for Exclusion
 7 Received, filed March 24, 2011 at p. 1.) The small fraction (.000056%) of the total class who
 8 have requested exclusion weighs heavily in favor of approval of the settlement. *Wilson v.*
 9 *Airborne, Inc.*, 2008 WL 3854963, at *7 (C.D. Cal. Aug. 13, 2008) (class settlement approved
 10 where 230 timely exclusion requests were received out of a class of 282,717 class members);
 11 *Churchill Village v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming approval of
 12 settlement with 500 opt-outs from a class of approximately 90,000).

13 In addition, there are only 15 class members who have voiced any objection to the
 14 settlement – objections which as discussed below include individuals whose only objection is that
 15 they believe the lawsuit “is wholly frivolous and nothing more than an attempt to shake down the
 16 defendant.” Docket No. 254.⁴ The limited number of objections (.0000025% - far less than 1%
 17 of the class) weighs heavily in favor of approval of the settlement. *Ellis v. Naval Air Rework*
 18 *Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (only three out of 2,500 class members who filed
 19 objections shows an “overwhelming sentiment of the class in favor of the [d]ecree, a factor which
 20 provides strong support for the fairness of its terms”); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610,
 21 624 (N.D. Cal. 1979) (objections from only 16 percent of the class was persuasive evidence that
 22 the settlement was adequate).

23 A finding of fairness, adequacy and reasonableness does not require that there be no
 24 objections. Rather, consideration is given to the number of objections filed as well as the nature
 25

26 ⁴ In contrast, the prior settlement in this litigation generated the filing of 44 objections – 3 times
 27 the number that this settlement generated, including objections raised by Matthew Elvey, who has
 28 objected to this settlement, for amongst other things the same reasons he previously objected.
 Docket No. 288, at p. 2.

of the objections. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*,
supra, 55 F.3d at 812 (“In an effort to measure the class’s own reaction to the settlement’s terms
 directly, courts look to the number and vociferousness of the objectors”); *Pallas v. Pacific Bell*,
 No. C-89-2373 DLJ, 1999 WL 1209495, at *6 (N.D.Cal. July 13, 1999) (“The greater the number
 of objectors, the heavier the burden on the proponents of settlement to prove fairness”).

Here, the exceedingly small number of and limited nature of the objections strongly
 support approval of the settlement.

**1. The Objections That the Settlement Fails to Provide Monetary Relief
 for Excessive Spam or Future Identity Theft– Objections by M. Blum
 and Kassim M. Ferris.⁵**

M. Blum objects to the settlement on the grounds that the settlement provides no monetary
 relief for those who received large amounts of spam email subsequent to the data breach. Kassim
 M. Ferris objects to the settlement on the grounds that it fails to provide relief for future identity
 theft.

The settlement does not provide monetary relief for those suffering from spam because, to
 date, the courts have declined to provide monetary relief for those who have simply suffered from
 excessive amounts of unsolicited emails. In *Cherny v. Emigrant Bank*, 604 F.Supp.2d 605 (S.D.
 N.Y. 2009), the court dismissed a class action complaint where, among other things, the plaintiff
 alleged that the bank’s disclosure of customer email addresses resulted in his receipt of excessive
 spam. In so ruling, the court noted that “[t]he receipt of spam by itself, however, does not
 constitute a sufficient injury entitling [plaintiff] to compensable relief.” *Id.*, at 609, citing
Burgess v. Eforce Media, Inc., No. 1:07cv231, 2007 WL 3355369, at *6 (E.D.N.C. Nov. 9, 2007);
Gordon v. Virtumundo, Inc., No. 06-0204, 2007 WL 1459395, at *8 (W.D. Wash. May 15, 2007);
Smith v. Chase, 293 A.D. 2d 598, 741, N.Y.S.2d 100, 102 (2d Dept. 2002).

Further, although plaintiffs initially asserted a claim for relief under the Controlling the
 Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act”), 15 U.S.C. §

⁵ Copies of these objections were mailed to Class Counsel and Defendant’s Counsel. There is no
 record that they have been filed with the Court.

7701, *et seq.*, the courts have held that only providers of Internet access service have standing to pursue a claim and to seek the statutory remedies available under that act. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1052 (9th Cir. 2009). The absence of a legal claim for damages arising from the receipt of spam demonstrates why the settlement does not provide monetary relief for those who suffered from unwanted spam.

Further, the cases are generally in accord that the risk of future identity theft is not a cognizable injury for which relief can be granted. *See, e.g., Ruiz v. Gap, Inc.*, 622 F.Supp.2d 908 (N.D. Cal. 2009) (although a job applicant had standing to bring a suit for potential identity theft arising from the theft of a laptop which contained personal information of the applicant and others, the claims were subject to dismissal on summary judgment because the job applicant's increased risk of future identity theft did not rise to the level of appreciable harm); *Stollenwerk v. Tri-West Healthcare Alliance*, Case No. 08-185PH, 2005 WL 2465906 (D. Ariz. September 6, 2005) same, *aff'd in part, rev'd in part on other grounds*, 254 Fed.Appx. 664 (9th Cir. 2007); *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702 (D.C. 2009); *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629 (7th Cir. 2007); *Guin v. Brazos Higher Educ. Service Corp., Inc.*, 2006 WL 288483 (D. Minn. 2006); *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018 (D. Minn. 2006); *Caudle v. Towers, Perrin, Forster & Crosby, Inc.*, 580 F.Supp.2d 273 (S.D. N.Y. 2008); *Cherny v. Emigrant Bank, supra*, 604 F.Supp.2d 608-09; *Shafran v. Harley-Davidson, Inc.*, No. 07 Civ. 01365, 2008 WL 763177, at *3 (S.D. N.Y. Mar. 20, 2008).⁶

2. Objections that State No Reason for The Objection Or Are Otherwise Unclear on the Basis for the Objection– Stanley Teich (Docket Nos. 259), Jeff Rubino (Docket No. 269) Charles F. Orelli (Docket No. 270) and William Lytran (Docket No. 272)

There are two objections that fail to state the basis for the objection. They are the objections of Jeff Rubino (Docket No. 269) and Charles F. Orelli (Docket No. 270). Mr. Rubino

⁶ Other courts have found that a plaintiff lacks standing to even assert a claim as to future identity theft. *Giordano v. Wachovia Securities LLC*, Civil No. 06-276 (JBS), 2006 WL 2177036 (D. N.J. July 31, 2006); *Key v. DSW, Inc.*, 454 F.Supp.2d 684 (S.D. Ohio 2006); *Bell v. Acxiom Corp.*, Case No. 06cv485 WRW, 2006 WL 2850042 (E.D. Ark. October 3, 2006).

1 merely states that he “objects to the actions of TD Ameritrade in case No. C-07-2852 VRW.”⁷
 2 Mr. Orelli voices many statements regarding his receipt of the notice of settlement, his having
 3 been victimized by identity theft and ensuing bad credit reports, but does not appear to state any
 4 objection to the settlement.⁸ The failure to articulate any reason for their objection provides
 5 sufficient grounds to decline to consider these objections.

6 Stanley Teich (Docket No. 259), simply requests that he be provided copies of any notices
 7 in the case. No objection is stated.

8 And, William Lytran in Docket No. 272, appears to be informing the Court of the
 9 circumstances of identity theft that he suffered. His comments seem to be in the nature of a claim
 10 rather than an objection. We have forwarded the document to the Claims Administrator. To the
 11 extent that the document seems to reflect a concern that Mr. Lytran’s losses are greater than the
 12 settlement will afford him, similar objections are addressed below in Section A.5.

13 The notice of this settlement informed class members that “[a]ny objection must include
 14 your name and address, telephone number and a statement of the reasons why you believe that the
 15 Court should find that the proposed Settlement is not fair or is not in the best interests of the
 16 Settlement Class. You must also submit proof of class membership.” Notice of Proposed Class
 17 Settlement, at p. 4. These objections should be rejected since they fail to state any reason why the
 18 Court should not find the settlement fair, reasonable or adequate. See *City of Detroit v. Grinnell*
 19 *Corp.*, 495 F.2d 448, 464 (2d Cir. 1974) (noting that objections that are based on unsupported
 20 suppositions were inadequate to disrupt a settlement).

21
 22
 23
 24 _____
 25 ⁷ The objection is somewhat of an enigma and could be interpreted simply to mean that Mr.
 26 Rubino is upset with the actions of TD Ameritrade as alleged in the Complaint. If that is so, the
 objection is not directed to the settlement.

27 ⁸ Although difficult to discern, it may be that the objector is seeking to have the Claims
 28 Administrator consider the issues presented in the objection as a claim for recovery. The Claims
 Administrator has been informed of this class member’s objection and will follow up with him.

3. **Objections that the Case Lacks Merit – Lynn O. Lamy (Docket No. 244), Thomasine V. Phillips (Docket No. 252), Timothy C. Ray (Docket No. 253), Hon. Guy E. Taylor (Docket No. 254) and Ana R. Torres (Docket No. 265).**

There are five objectors who are opposed to the settlement because they do not believe that the claims have any merit. For example, Lynn O. Lamy states that she believes “this claim to be unjustified, frivolous and fostered by opportunistic shysters with a low sense of morality.” Docket No. 244. And, Timothy C. Ray states: “I have not been ‘harmed’ as suggested in this proposed settlement therefore I do not believe that Ameritrade is guilty of this claim. It would be wrong for me, and others, to profit from this lawsuit.” Docket No. 253. The objector proceeds to assert concerns that he will be “indirectly harmed” if the settlement is approved as a result of the “associated legal costs.” *Ibid.* Similarly, Thomasine V. Phillips objects on the grounds that she “want[s] to be released from all attorneys’ fees and costs.” Docket No. 252. The Honorable Guy E. Taylor (an Administrative Law Judge) states that “this lawsuit is wholly frivolous and nothing more than an attempt to shake down the defendant.” Docket No. 254. And, Ana R. Torres voices her opinion that “it appears that some greedy Lawyers have found a reason and person upset enough to know that the emails MAY have been compromised” and that ultimately the “lawyers will Get \$4million and the plaintiffs split \$2 Million amongst 1 million plaintiffs (not sure how many) so we get \$2.” Docket No. 265. The objector then opines that it is “lawsuits like this that ends up hurting the consumer more because the cost of that law suit will have to be passed on to the client.” *Ibid.*

The foregoing objections are, among others, the type of objection raised by a defendant in an effort to avoid liability. As the court in *Dewey v. Volkswagen of America*, 728 F.Supp.2d 546 (D.N.J. 2010) remarked in rejecting similar objections to final approval of a class action settlement:

The Court’s obligation when evaluating a class settlement is not to protect the defendants but rather “to ensure that other unrepresented parties (absent class members) and the public interest are fairly treated by the settlement reached between the class representatives and the defendants.”

728 F.Supp.2d at 576, quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 503, 594 (3d Cir. 2010).

1 The defendant in this litigation has been well and ably represented by highly experienced
 2 counsel. The defendant has had every opportunity to protect its interests and has voluntarily
 3 agreed to the settlement. Objections that seek to protect the defendant as opposed to the class
 4 should not be given substantial credence in establishing whether the settlement is fair, reasonable
 5 and adequate.

6 Moreover, objections that incorrectly state the facts of the settlement and argue against
 7 alleged excessive attorneys' fees or attack plaintiffs' counsel for having filed the action in the first
 8 place, fail entirely to aid this Court in its decision. For example, the objection that the class
 9 members will receive only \$2 and class counsel will receive \$4 million is simply incorrect. In
 10 this case, class counsel have agreed to limit any fee and cost award to \$500,000. Moreover, they
 11 have further agreed to waive any fee and cost award in the event that the claims equal or exceed
 12 the settlement cap of \$6.5 million. The efforts by class counsel to ensure the maximum recovery
 13 to the class can hardly be considered the actions of "greedy lawyers." Indeed, Judge Walker in
 14 his December 20, 2010 Order granting preliminary approval of this settlement, expressed concern
 15 that as a result of the terms of the settlement, counsel may not receive any fees in the case. See
 16 December 20, 2010 Order, at p. 9.

17 **4. Objections that the Claims Process is Too Onerous – Objections of**
 18 **Conrad Lohutko and Steven T. Greeran (Docket No. 275).**

19 Two objections have been submitted that complain that the claims process is too onerous
 20 and requires the submission of documentation of identity theft that may not have been retained by
 21 the class members. These are the objections of Conrad Lohutko and Steven T. Greeran (Docket
 22 No. 275).

23 The settlement provides the payment of \$50 in the event that a class member suffered
 24 identity theft as to an existing credit or debit card. The settlement also provides for the payment
 25 of \$250 for identity theft in an account other than an existing credit or debit card and in addition
 26 up to \$1,000 (including the \$250) for out of pocket expenses and up to \$2,500 (including the
 27 \$1,000 and \$250) for any unreimbursed losses. The claim form advises class members that some
 28 form of proof is required to support the claim of identity theft. The rationale for this is obvious –

1 it is to provide corroboration for the claim of identity theft and to ensure that valid claims are
2 being filed.

3 However, the claim form further informs the class that strict compliance with the request
4 that certain types of document be provided is not necessary and that the Claims Administrator
5 will give consideration to other types of supporting documentation. Specifically the claim form
6 provides:

7 You should provide to the Claims Administrator a copy of any police report or
8 other report to a government agency such as the FTC or the FBI or U.S. Postal
9 Service or a letter or affidavit from a credit card company or bank or other creditor
10 stating that account charges were fraudulent due to identity theft. If you are unable
11 to provide the type of documentation described above, but are able to provide to
12 the Claims Administrator another type of documentation that shows you were a
13 victim of identity theft, the Claims Administrator will consider other
14 documentation you provide. *However, your claim is more likely to be approved if
15 you are able to submit to the Claims Administrator a police report or other report
16 to a government agency such as the FTC or a letter or affidavit from a credit card
17 company or other creditor stating that account charges were fraudulent due to
18 identity theft.*

19 Docket No. 227, Exhibit F to Class Action Settlement Agreement (emphasis in original).

20 Thus there is no factual support for Mr. Lohutko's objection that the "other forms
21 of proof as to a class members damages should be allowed." As noted above, the Claims
22 Administrator will give consideration to such other forms of proof.

23 To the extent that Mr. Greeran's objection that he has "no supporting document or
24 unauthorized transactions on my statements" means that he has suffered from identity
25 theft but has no supporting documentation, the claim form informs him to submit any
26 other documentation that would support his claim. Alternatively, to the extent Mr.
27 Greeran's objection is that he has not been the victim of identity theft but believes that he
28 should be entitled to monetary payment as part of the settlement, the arguments set forth
in Section A.1 above, show why Mr. Greeran is not entitled to monetary payment.

1 **5. Objections that the Settlement Fails to Provide Sufficient Monetary**
 2 **Relief for Identity Theft or That the Settlement Fails to Provide Relief**
 3 **for Injuries Resulting from the Purchase of Penny Stock – Objections**
 of Bonnie Elaine Diskand; Frank Catapano (Docket No. 271) and Jack
 Simke (Docket No. 267)

4 Bonnie Elaine Diskand objects to the settlement because she does not believe that the
 5 settlement provides sufficient monetary relief for the identity theft that she suffered including the
 6 emotional distress and medication expenses that she has incurred. Based on the information
 7 provided in her objection it would appear that Ms. Diskand is entitled to file a claim seeking the
 8 \$250 settlement amount and in addition would be entitled to seek recovery up to \$1,000
 9 (including the \$250) for her out of pocket expenses. However, she believes that this is
 10 insufficient to compensate her for her losses.

11 These objections fail to take into account that a settlement represents a compromise. As
 12 discussed in plaintiffs’ opening brief, most courts that have addressed similar data breach class
 13 actions on the merits have dismissed plaintiffs’ claims. In addition, an individual bringing a
 14 claim against TD Ameritrade for actual identity theft would have to prove that the identity theft
 15 was caused by the data breach, a significant evidentiary burden. Under the settlement, class
 16 members do not have to carry that heavy burden to be entitled to compensation. For these
 17 reasons and others stated in this brief and in plaintiffs’ opening brief, we firmly believe that the
 18 settlement is reasonable in light of the issues that exist with respect to the merits of plaintiffs’
 19 claims.

20 In any event, the limits proscribed by the settlement for recovery by class members find
 21 support in surveys conducted regarding the general scope of damage suffered by victims of
 22 identity theft. *See* Federal Trade Commission, 2006 Identity Theft Survey (Nov. 2007) at pp. 4
 23 and 38 (noting that “the average victim loss was \$371 and that “more than three quarters (80%) of
 24 victims in the Existing Credit Cards Only category paid no out-of-pocket expenses, compared to
 25 37% for victims in the New Accounts & Other Frauds category and 54% for the Existing Non-
 26 Credit Card Accounts category”); *Identity Theft: Prevalence and Cost Appear to be Growing*,
 27 United States General Accounting Office, GAO-02-363 (March 2002) at pp. 56-57 (for the period
 28 1999 to 2001 out of a total of 94,100 complaints, 2,633 (2.8%) reported a monetary loss with

1 1,554 (1.6%) reporting losses under \$1,000 and 1,079 (1.2%) reporting losses in excess of
2 \$1,000). That the losses are generally within the foregoing limits is not surprising given the legal
3 limits imposed on financial institutions in seeking recovery for identity theft from the victim.

4 Any class member whose damages exceed the limits set by this settlement retained the
5 right to opt out of the class action and to pursue his or her claims independent of this litigation.

6 In addition, Mr. Catapano (Docket No. 271) appears to object to the settlement on the
7 grounds that it fails to provide compensation for losses he suffered as a result of investing in
8 penny stocks.⁹ To the extent that Mr. Catapano's investment is somehow related to receipt of
9 spam, establishing a causal link between the spam and losses on the transaction will present
10 serious challenges. It is highly unlikely that Mr. Catapano would have ever recovered for these
11 losses in this litigation given the nature of the claim and significant argument that there was a
12 break in any causal link between the actions of TD Ameritrade and Mr. Catapano's decision to
13 purchase penny stock.

14 Mr. Simke's objection (Docket No. 267) is one that is based on his belief that the relief is
15 insufficient to curb TD Ameritrade's conduct towards its customers. The settlement requires
16 that, in addition to paying claims of up to \$6.5 million, TD Ameritrade also retain at its expense
17 an independent data security expert to evaluate whether TD Ameritrade is in compliance with the
18 security standards incorporated in the Settlement Agreement and promptly remedy any non-
19 compliance. Thus, contrary to Mr. Simke's objection, the settlement does provide for a review
20 that will ensure that there exist or will exist safeguards to prevent a future occurrence.

21 In addition, TD Ameritrade has borne the cost of administration for this settlement as well
22 as the prior settlement. The Company will have expended millions of dollars in defending and in
23 settling this litigation, which has been ongoing since 2007. It is likely that this experience (and
24 the significant monetary expenditures that it has and will incur) coupled with the public relations
25 impact that resulted from the disclosure of the data breach, has had a sufficient impact both

26 _____
27 ⁹ The basis for Mr. Catapano's objection is not entirely clear. We believe that he is objecting that
28 he cannot seek recovery for losses associated with trades in penny stock of BTCO.

1 financially and otherwise to reinforce for TD Ameritrade the importance of security for its
2 customers' personal information.

3 **6. The Objections Raised by Matthew Elvey**

4 **i. The Procedural History**

5 This lawsuit was originally filed by Matthew Elvey on May 31, 2007. Docket No.
6 1. On May 30, 2008, a class action settlement was presented by plaintiffs including Mr.
7 Elvey and another plaintiff Gadgetwiz.com, Inc. for preliminary approval. Docket No. 53.
8 On June 12, 2008, at the hearing on preliminary approval, Mr. Elvey appeared and
9 objected to the settlement, claiming that the benefits were "trivial" and that he was
10 "threatened" into signing the settlement agreement. Order, dated June 13, 2008 (Docket
11 No. 61, at p. 3.)

12 As a result of, among other things, Mr. Elvey's objections, the Court denied
13 preliminary approval without prejudice. Mr. Elvey then retained counsel, Mark Chavez of
14 Chavez and Gertler and Gregory Beck of Public Citizen. A response to the June 13, 2008
15 Order was filed by Mr. Elvey through his counsel. Docket No. 73. And, TD Ameritrade
16 also filed a response to the June 13, 2008 Order. Docket No. 74. The hearing on
17 preliminary approval was then reset to October 7, 2008. Docket 84.

18 Following the submission of additional documents, on March 1, 2009, the Court
19 granted preliminary approval to the settlement. Docket No. 93. Notice was then given to
20 the class in accordance with the Court's Order. *Ibid.*

21 On July 9, 2009, Mr. Elvey through his counsel filed a memorandum in opposition
22 to the proposed class settlement. Docket No. 152. And, on July 13, 2009, Mr. Elvey
23 personally filed a letter "vehemently objecting to the preliminary proposed settlement."
24 Docket No. 163.

25 On October 23, 2009, the Court issued its Order denying final approval to the
26 proposed class settlement. Docket No. 189. In addition, the Court expressed interest in
27 having counsel for Richard Holober, who also had objected to the prior settlement, assume
28 responsibility for the prosecution of the case. *Id.*, p. 12-13.

On August 16, 2010, counsel for Mr. Elvey filed a motion to withdraw as his counsel and represented therein that due to irreconcilable differences, their further effective representation was impossible. Docket No. 213, at pp. 1 and 3. On August 25, 2010, the Court granted the motion to withdraw. Docket No. 216.

At the hearing on preliminary approval, Mr. Elvey appeared and orally announced his
6 objections to the settlement.¹⁰ The objections that he raised (and plaintiffs' responses to those
7 objections) are set forth below:

- Plaintiffs' Response:** As discussed above, there is substantial uncertainty whether the class could achieve any remedy if plaintiffs' claims were fully litigated on the merits. A settlement is a compromise, and this settlement is a fair and reasonable compromise in light of the merits of the case.

- ¹⁰ Mr. Elvey endeavored to electronically file his objections but was not able to do so. His written objections which mirror his statements in court were thereafter filed. Docket No. 237.

1 theft or “account-based identity theft, i.e. someone who may have a criminal record due to being
 2 impersonated by an arrestee, or those who suffered spam and may have also fallen victim to the
 3 touting of penny or other stocks.” Docket No. 237, at pp. 2-3.

4 **Plaintiffs’ Response:** These arguments are addressed in sections A.1 and A.5
 5 above.

6 • **Elvey Objection:** The settlement fails to require that TD Ameritrade adopt “any
 7 new [permanent] [sic] security measures to remedy the problem giving rise to the lawsuit or even
 8 to reveal what those security problems were and how it has fixed them.” *Id.*, p. 3 and pp. 5-6.

9 **Plaintiffs’ Response:** The settlement requires that TD Ameritrade retain an
 10 independent data security analyst – a company that was suggested by Mr. Elvey – to do an
 11 extensive review of the Company’s data security systems and to ensure that they comply with a
 12 host of requirements that are defined in Exhibit G to the Class Action Settlement Agreement.
 13 Docket 227.

14 • **Elvey Objection:** The documents filed in support of preliminary approval were
 15 not in the format required by General Order 45, Section VI.B. *Ibid.*

16 **Plaintiffs’ Response:** Certain of the documents were in the recommended format
 17 and others were not due to the fact that certain documents were not publishable to pdf due
 18 to the presence of signatures and other exhibit issues.

19 • **Elvey Objection:** The website created for the settlement should not be identified
 20 as “stockspamsettlement.com.” Docket No. 237, at p. 4.

21 **Plaintiffs’ Response:** The website was not so identified – it bore the domain
 22 name of “accountdatasettlement.com.”

23 • **Elvey Objection:** The settlement failed to incorporate the benefits of the prior
 24 unapproved settlement into this settlement, including the provision of a free Trend Micro Internet
 25 Security Pro software offer. Docket No. 237, at p. 4.

26 **Plaintiffs’ Response:** The prior settlement was found not to be fair, reasonable
 27 and adequate to the class. (Docket No. 189.) Accordingly, neither plaintiffs nor TD
 28 Ameritrade believed that there was any purpose served in including the components of the

prior settlement into the new settlement. The parties' negotiations were directed to crafting a settlement that did not suffer from the perceived impediments of the prior settlement and accordingly did not incorporate terms that were previously found to be non-beneficial. The Trend Micro Internet Security software was a highly controversial provision that drew a number of objections to the settlement, including vigorous objection from Mr. Elvey. *See, e.g.*, Docket No. 73 (Plaintiff Matthew Elvey's Corrected Response to the Parties' Briefs in Response to the Court's June 13, 2008 Order, p. 14 [noting that "the software will be worthless to the many class members who already have anti-spam software or who use popular online email clients like Gmail, Yahoo!, and Hotmail that are free of charge and have anti-spam capabilities built in"]; Docket No. 152, pp. 6-7, and 16-17.) That it ultimately did not form a provision in the present settlement is thus not surprising.

- **Elvey Objection:** The notice procedures did not provide for the mailing of notice to Class members. Docket No. 237, at p. 4.

Plaintiffs' Response: The notice program approved by the Court provided for a three-pronged notice process including mailing of a postcard to class members, emailing the notice to class members and publication of a summary version of the notice in USA Today on two separate occasions. The Court found that the notice procedures were "the best notice practicable given the circumstances." Order, filed December 20, 2010, (Docket No. 242) at p. 11. There is no requirement that mailed notice be given in all cases. *See, e.g., In re Domestic Air Transportation Antitrust Litig.*, 141 F.R.D. 534 (N.D. Ga. 1992) (finding that innovative published notice program and not individual mailing to class members satisfied due process concerns as well as defendants' res judicata concerns).

- **Elvey's Objection:** Plaintiffs' counsel will no longer receive \$2.3 million and those funds should have been used to pay claims of class members. Docket No. 237 at p. 5.

Plaintiffs' Response: The prior settlement provided no cash payment to class members. The current settlement provides for up to \$6.5 million in cash to be paid for

claims and no less than \$2.5 million. The maximum that class counsel may seek for fees and costs is limited to \$500,000. On its face, Mr. Elvey's objection lacks merit.

- **Elvey's Objection:** Mr. Elvey is not entitled to receive the \$10,000 incentive payment that was previously proposed to be paid to class representatives. Docket No. 237, at p. 5.

Plaintiffs' Response: Mr. Elvey is correct – in the current settlement **no** class representative or plaintiff will be entitled to **any** incentive payment. Moreover, Mr. Elvey's objection is inconsistent with his other objections because if his other objections were to be sustained, which they should not be, there would be no settlement and no basis for incentive payments.

iii. Mr. Elvey's Objections to Final Approval of the Settlement

Mr. Elvey restates the foregoing objections in opposition to final approval of the settlement. Docket No. 288, at p. 1. He also restates the objections that he made to the prior settlement (*ibid*), although those objections were to a vastly different settlement and can not be reconciled with the present settlement.

In addition, Mr. Elvey complains about certain procedures including an alleged conversation that he had with a representative of the Claims Administrator who purportedly misrepresented to him certain of the terms of the settlement. Docket No. 288, pp. 1-2. In the Declaration of Jeannine Andreis Re: Notice Procedures and Objections Raised by Matthew Elvey ("Andreis Decl.") filed concurrently herewith, the conversation between Mr. Elvey and a call center representative are addressed. Andreis Decl., ¶¶ 4-8. Mr. Elvey is the only individual who made inquiries of the nature that he discusses in his objection. *Id.*, ¶ 8. And, the call center representative clearly informed Mr. Elvey that he should contact Class Counsel with his inquiries. *Id.*, ¶ 6.

Mr. Elvey also complains that the claim form was not promptly available on the website and he objects to an alleged delay in redirecting class members from the old website to the new website. These complaints are also addressed in the Andreis Declaration. The claim form was

made available in pdf on the settlement website by January 18, 2011 (three days after the deadline for the mailing and emailing and publication of the notice). The electronic form (capable of being filed out and submitted on line) was made available on February 1, 2011. The Claims Administrator has also mailed hard copies of the claim form to 2,499 class members. The deadline for the submission of claim forms is July 6, 2011. There is no evidence presented that the minimal delay in posting the claim form in pdf or the electronic form has adversely affected the submission of claim forms. Indeed, as of the filing of this response, more than 8,000 claim forms have been submitted and there are 3 months remaining for the submission of forms.

And, finally Mr. Elvey objects to the fact that he cannot opt out and object at the same time. This issue is fully addressed in TD Ameritrade's Response to the Objections and no further response is necessary.

III CONCLUSION

For the foregoing reasons, Plaintiffs, on behalf of the Class, respectfully request that this Court overrule the objections and grant final approval to the proposed Settlement.

Dated: April 4, 2011

Respectfully submitted,

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